

Message Text

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ACTION SS-25

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O R 051551Z AUG 77
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TO SECSTATE WASHDC IMMEDIATE 0374
USMISSION USBERLIN IMMEDIATE
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C O N F I D E N T I A L SECTION 01 OF 04 BONN 12843

EXDIS

DEPARTMENT PLEASE NOTIFY EUR/CE ON RECEIPT

E.O. 11652: GDS
TAGS: PGOV, BQG
SUBJECT: LORENZ-DRENCKMANN CASE IN BERLIN - PRELIMINARY
ANALYSIS OF PRESENT STATUS

REFS: (A) BONN 12830; (B) 76 BONN 11478; (C) BONN 12504
(D) STATE 181702; (E) 76 BONN 13126
(F) STATE 180322

BEGIN SUMMARY: WE ARE CONCERNED THAT THE LORENZ-
DRENCKMANN CASE MAY BE DEVELOPING INTO A CONFRONTATION
AMONG THE FRG AND THE ALLIES, WITH NO TWO PARTIES
ENTIRELY IN ACCORD. OF THE ALLIES, THE FRENCH SEEM
TO HAVE THE HARDEST POSITION, WHICH MAY EVEN EXTEND
TO ADVOCATING AN ALLIED BAN OF THE TRIAL IN BERLIN.
WHILE WE ARE CONCERNED ABOUT THE RECENT SPATE OF
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UNFORTUNATE PUBLICITY, WE BELIEVE THAT THE FOREIGN
OFFICE CLEARLY UNDERSTANDS AND SHARES ALLIED CONCERNS
AND IS ATTEMPTING TO DAMPEN THE PUBLICITY. WE DO NOT
BELIEVE THAT IT WOULD BE USEFUL TO CONTINUE THE PRESSURE
ON THE FOREIGN OFFICE AT THIS POINT BUT PREFER TO
GIVE THEIR RECENT EFFORTS AN OPPORTUNITY TO WORK.
SHOULD FURTHER STEPS BE REQUIRED -- AND THE FRENCH

IN PARTICULAR MAY INSIST ON SUCH STEPS EVEN IF THERE IS A LULL IN THE PUBLICITY -- THERE ARE A NUMBER OF MEASURES (SHORT OF BANNING THE TRIAL) WHICH COULD BE UNDERTAKEN. ALL OF THEM WOULD HAVE A POLITICAL PRICE IN TERMS OF OUR RELATIONS WITH THE FRG AND WOULD REQUIRE CAREFUL CONSIDERATION FOR THAT REASON. IN ADDITION, FEW OF THEM WOULD REALLY SATISFY THE SOVIETS. WE CONCLUDE THAT THE BEST COURSE AT THE MOMENT IS TO RIDE OUT THE STORM WHILE WAITING TO SEE WHETHER THE FOREIGN OFFICE'S CURRENT EFFORTS ARE SUCCESSFUL. END SUMMARY

1. AS STATED IN REF A, WE ARE CONCERNED THAT THE MATTER OF THE LORENZ-DRENCKMANN PROSECUTION IN BERLIN MAY BE DEVELOPING INTO A CONFRONTATION AMONG THE FRG AND THE ALLIES WITH NO TWO OF THE PARTIES INVOLVED ENTIRELY IN ACCORD. THE PURPOSE OF THIS TELEGRAM IS TO REVIEW THE PRESENT STATUS OF THE CASE AND GIVE OUR VIEWS ON WHAT, IF ANYTHING, SHOULD BE DONE AT THIS POINT.

2. THE ISSUES. THERE ARE TWO AND PERHAPS THREE ISSUES IN THIS CASE: WHETHER THE TRIAL SHOULD BE HELD IN BERLIN, HOW IT SHOULD BE HANDLED IF HELD IN BERLIN, AND -- AN ISSUE WHICH IN OUR VIEW HAS BEEN SETTLED -- WHETHER THE TRIAL MAY LEGALLY BE HELD THERE. WE
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MENTION THE THIRD WITHOUT ATTEMPTING TO REPEAT THE HISTORY OF THE QA NEGOTIATIONS, THE ALLIED AMBASSADORS' LETTER TO THEN FOREIGN MINISTER SCHEEL CONCERNING THE COURTS IN BERLIN, ETC., MERELY BECAUSE THERE IS SOMETIMES AN UNFORTUNATE TENDENCY TO BLUR THE DISTINCTIONS BETWEEN WHAT IS LEGALLY PERMITTED AND WHAT IS POLITICALLY DESIRABLE. WE STATE OUR VIEW THAT THE TRIAL MAY LEGALLY BE HELD IN BERLIN AS A BASIC ASSUMPTION, FOR TO ADOPT A CONTRARY VIEW WOULD RUN COUNTER TO COMMITMENTS WE HAVE MADE TO THE FRG AND WOULD UNDERMINE THE ALLIED AND FRG INTERPRETATION OF THE QUADRIPARTITE AGREEMENT IN WHAT IS ADMITTEDLY A GRAY AREA. IF THE TRIAL CANNOT LEGALLY BE HELD THERE, WE SHOULD NOT HAVE ALLOWED MATTERS TO PROGRESS THIS FAR.

3. THE NATIONAL POSITIONS

A. LEGALITY OF TRIAL IN BERLIN. THE FRG, THE UK AND THE US SEEM TO BE IN ACCORD ON THE PROPOSITION THAT THE TRIAL MAY LEGALLY BE HELD IN BERLIN. WE ASSUME, BUT ARE NOT CERTAIN, THAT THE FRENCH ALSO

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SHARE OUR VIEW OF THIS RELATIVELY NARROW POINT. THEN
FOREIGN MINISTER SAUVAGNARGUES EXPRESSED THE VIEW
LAST YEAR (REF B) THAT FILING THE CHARGES IN BERLIN
BY THE FEDERAL PROSECUTOR GENERAL WOULD NOT BE
COMPATIBLE WITH THE WORDING OF THE QA OR AT LEAST
WOULD OPEN THE WAY TO SOVIET CHARGES THAT IT WAS IN
CONFLICT WITH THE QA. HOWEVER, SINCE THE FRENCH
AGREED TO PERMIT THE TRIAL TO BE HELD, WE ASSUME THEY
WOULD BE HARD-PRESSED NOW TO DENY ITS LEGALITY. THE
FRENCH BONN GROUP REP (RICHARD) EXPRESSED MILD SURPRISE
ON AUGUST 4 THAT US AND UK OFFICIALS, IN RECEIVING
THE MOST RECENT SOVIET PROTEST ON THE LORENZ CASE, HAD
MADE ORAL RESPONSES THAT THE TRIAL WAS "ALL RIGHT."
WE RESPONDED THAT WE UNDERSTOOD THE US RESPONSE
(REF F) TO BE THAT THE TRIAL WAS NOT A VIOLATION OF
THE QA, TO WHICH RICHARD SAID THAT HE WAS NOT SO
CERTAIN. WE CAN ONLY ATTRIBUTE THIS REMARK AND THE
FRENCH REQUEST THAT CONSIDERATION BE GIVEN TO BANNING
THE TRIAL (REF C) AS A CONFUSION OF LAW AND POLICY.
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B. WHETHER THE TRIAL SHOULD BE HELD IN BERLIN. AGAIN, THE FRG, THE UK AND THE US ARE IN ACCORD (REF C) THAT THE TRIAL SHOULD GO ON AS SCHEDULED, IF FOR NO OTHER REASON THAN THAT THE POLITICAL COSTS OF NOT HOLDING THE TRIAL THERE ARE TOO GREAT. FOR THE FRG, IT WOULD MEAN SERIOUS ATTACKS FROM THE OPPOSITION (WHO HAVE EVEN CRITICIZED THE FACT THAT THE BERLIN OFFICE OF THE FEDERAL PROSECUTOR, NOT THE MAIN OFFICE IN KARLSRUHE, WILL BE RESPONSIBLE FOR IT) AT A TIME WHEN TERRORISM IS A SERIOUS AND EMOTIONAL ISSUE. FOR THE ALLIES, IT COULD BECOME A BILATERAL ISSUE OF SOME CONSEQUENCE IN THEIR RELATIONS WITH THE FRG. FINALLY, IT WOULD PROBABLY INDICATE TO THE SOVIETS THAT THE ALLIES HAVE SLACKENED SOMEWHAT THEIR RESOLVE WITH REGARD TO BERLIN, ESPECIALLY SINCE WE PERMITTED PROSECUTION IN THE MAHLER CASE. WHILE AT ONE POINT IT MIGHT HAVE BEEN POSSIBLE TO HAVE THE TRIAL HELD ELSEWHERE, WE BELIEVE THAT THAT OPPORTUNITY HAS PASSED. EVEN WHEN THIS WAS POSSIBLE, IT WOULD HAVE REQUIRED AN ALLIED BAN SINCE THE FRG INDICATED THAT IT COULD NOT DO SO ON ITS OWN INITIATIVE BUT COULD LIVE WITH AN ALLIED BAN (REF B). HOWEVER, THE ALLIES DID NOT TAKE THIS STEP. AS NOTED ABOVE, THE CURRENT FRENCH POSITION IS MORE AMBIGUOUS THAN THAT OF THE OTHER THREE, BUT THE FRENCH DEMARCHE (REF D) IN THE DEPARTMENT (WE UNDERSTAND ANOTHER MEETING IS SCHEDULED FOR AUGUST 5) WOULD APPEAR TO INDICATE THAT THE FRENCH CAN BE DISSUADED FROM ADOPTING THE LINE THAT THE TRIAL SHOULD BE BANNED. AT THE MOMENT, THE FRENCH HERE ARE AWAITING NEW INSTRUCTIONS FROM PARIS.

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C. HOW THE TRIAL SHOULD BE HANDLED. ON THIS ISSUE, THE FOUR POSITIONS APPEAR TO BE THE MOST DIVERGENT. THE UNFORTUNATE SPATE OF RECENT PUBLICITY HAS CAUSED HARD FEELINGS AND WE ARE SOMEWHAT CONCERNED THAT, UNLESS A COMMON POSITION CAN BE AGREED UPON AND MAINTAINED, LINES MAY HARDEN. THE FRG FOREIGN OFFICE IS TORN BETWEEN DEFENDING THE STATEMENTS OF THE FEDERAL PROSECUTOR GENERAL ON THE ONE HAND AND TRYING TO EXERCISE SOME CONTROL OVER FUTURE STATEMENTS. WE ARE DISTURBED BY THE PROSECUTOR GENERAL'S REMARKS BUT APPARENTLY LESS SO THAN ARE THE BRITISH OR FRENCH. WHILE MORE RESTRAINED THAN THE BRITISH IN THEIR

COMMENTS TO THE FRG, THE FRENCH APPEAR TO BE TAKING THE HARDEST LINE IN THEIR DISCUSSIONS WITH US, AS THE DEMARCHE IN WASHINGTON INDICATES. THEY WOULD PROBABLY LIKE AT A MINIMUM TO IMPOSE NEW AND TIGHTER CONDITIONS FOR HOLDING THE TRIAL IN BERLIN.

4. FRG CONDUCT TO DATE. WHILE THE DISCRETION AND SENSITIVITY OF SOME BERLIN SENAT AND FRG OFFICIALS HAS BEEN LESS THAN EXEMPLARY AND WHILE THEIR STATEMENTS HAVE PROBABLY INSTIGATED THE SOVIETS TO MAKE A NEW ROUND OF DEMARCHES, THERE HAVE BEEN NO SIMILAR INDISCRETIONS IN THE LAST FEW DAYS. OUR VIEW IS THAT THE FOREIGN OFFICE IS MAKING AN HONEST EFFORT TO BRING THE PROBLEM UNDER CONTROL, AS DEMONSTRATED BY VAN WELL'S MOST RECENT LETTER TO THE JUSTICE MINISTRY. HOW SUCCESSFUL THEY WILL BE REMAINS TO BE SEEN. THE FACT REMAINS THAT THE FRG HAS NOT VIOLATED ANY OF THE LITERAL TERMS OF THE NON-PAPER (REF E), ALTHOUGH THE CONDITION OF "PARTICULAR RESERVE AND DISCRETION" IN THE MATTER OF PUBLICITY IS CLOSE TO

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BEING BREACHED. WHILE THE NON-PAPER MIGHT HAVE BEEN MORE TIGHTLY DRAFTED, OUR RECORDS AND RECOLLECTION SHOW THAT THE MAIN CONCERN AT THE TIME WAS TO PREVENT

THEN FEDERAL PROSECUTOR BUBACK FROM PARTICIPATING PERSONALLY IN THE TRIAL AND THAT THE NON-PAPER WAS THE RESULT OF HARD NEGOTIATIONS BETWEEN THE ALLIES AND THE FRG IN THE BONN GROUP. WHETHER MORE MIGHT HAVE BEEN ACHIEVED UNDER MORE IDEAL CONDITIONS IS, UNFORTUNATELY, AN ACADEMIC QUESTION AT THIS POINT.

5. THE SOVIET REACTION. THE SOVIETS HAVE NOW PROTESTED FOUR TIMES SINCE FEBRUARY 1976 ABOUT THE LORENZ CASE. WE ARE NOT IN A POSITION TO JUDGE HOW IMPORTANT THIS MATTER IS TO THE SOVIETS OR WHAT THEY WILL DO IF WE DO NOT ACCEDE TO THEIR DEMANDS. IT IS APPARENT FROM PROTESTS ON THIS AND OTHER MATTERS CONCERNING THE COURTS THAT THE SOVIETS HAVE OVER THE PAST YEAR BEEN FOCUSING ON THE ENTIRE FEDERAL COURT STRUCTURE IN BERLIN. IT HAS ALSO BEEN APPARENT SINCE CONFIDENTIAL

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CONCLUSION OF THE QA THAT THIS IS AN AREA WHERE THE POTENTIAL FOR CONFRONTATION WITH THE SOVIETS OVER WHAT WAS AGREED IN THE QA IS GREAT. WE DOUBT THAT ANY STEPS WE MIGHT TAKE, SHORT OF BANNING THE TRIAL IN BERLIN ALTOGETHER, WOULD BE PARTICULARLY MEANINGFUL TO THE SOVIETS, ALTHOUGH SOVIET PRESTIGE WOULD NOT BE ENGAGED TO QUITE THE DEGREE IT HAS BEEN IF PUBLICITY IN THE FRG WERE DAMPENED. STEPS TAKEN AT ALLIED BEHEST MIGHT ALSO HAVE THE DISADVANTAGE OF SUGGESTING TO THE SOVIETS THAT WE HAVE DOUBTS ABOUT THE LEGALITY OF THE TRIAL'S BEING HELD IN BERLIN OR THAT WE ARE PREPARED TO BACK DOWN BECAUSE OF THEIR DEMANDS.

6. WHAT CAN BE DONE. THERE ARE A NUMBER OF STEPS WHICH COULD BE TAKEN TO SHORE UP OUR ARGUMENT THAT THE TRIAL IS STRICTLY A BERLIN AFFAIR AND IS NOT A VIOLATION OF THE QUADRIPARTITE AGREEMENT. THESE WOULD BE LARGELY COSMETIC IN NATURE, ALTHOUGH WE WOULD NOT PROPOSE TO DISMISS THEM FOR THAT REASON ALONE. THE BASIC QUESTION IS HOW FAR WE CAN PRESS THE FRG WITHOUT INTERFERING (OR APPEARING TO INTERFERE) IN ITS INTERNAL AFFAIRS. FRG SENSITIVITIES HAVE BEEN ENGAGED, AND THERE ARE OBVIOUS LIMITS TO HOW FAR WE CAN, FOR POLITICAL REASONS, INSIST THAT OUR SUPREME AUTHORITY IN BERLIN GIVES US DISCRETION TO DIRECT THE FRG IN THE CONDUCT OF THIS CASE -- WHICH INVOLVES THE COMBATTING OF TERRORISM IN THE ENTIRE FRG AS WELL AS BERLIN. THE FRENCH, MUCH MORE THAN THE US OR UK, APPEAR TO BE PREPARED TO INSIST ON EXERCISING NEARLY THE FULL MEASURE OF SOVEREIGNTY. SOME OF THE POSSIBLE STEPS ARE:

(A) ADDITIONAL ALLIED DEMARCHES, AT AMBASSADORIAL
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LEVEL, TO THE FRG EXPRESSING OUR CONCERN ABOUT THE
WAY THE TRIAL IS BEING CONDUCTED AND ASKING FOR
APPROPRIATE AMELIORATIVE STEPS.

(B) INSISTING THAT PUBLIC GOVERNMENTAL STATEMENTS
BE KEPT TO A MINIMUM, OR THAT THEY BE CLEARED WITH
THE ALLIES, OR THAT THEY BE MADE ONLY IN BERLIN, OR
A COMBINATION OF THE ABOVE.

(C) INSISTING THAT BUNDESANWALT OBERLE, HEAD
OF THE BERLIN OFFICE OF THE FEDERAL PROSECUTOR, BE
MADE BOTH THE APPARENT AND THE REAL HEAD OF THE
PROSECUTING TEAM.

(D) INSISTING THAT THE INDICTMENT BE WITHDRAWN
AND A NEW ONE BE ISSUED, SIGNED BY OBERLE.

(E) ISSUANCE OF A STRONG ALLIED STATEMENT IN
BERLIN, EITHER BY BK/O OR BK/L, REEMPHASIZING THE
FACT THAT FRG OFFICIALS IN BERLIN ARE SUBJECT TO
ALLIED AUTHORITY AND MAY CONDUCT THE TRIAL ONLY IN
ACCORDANCE WITH ALLIED LAW, AND PERHAPS NOTING THAT
NO APPEALS MAY BE TAKEN TO COURTS OUTSIDE OF BERLIN
(E.G. TO THE FEDERAL CONSTITUTIONAL COURT).

(F) INSISTING THAT ALL PROSECUTORS WHO ARE TO
TAKE PART IN THE TRIAL SHOULD BE FULLY TRANSFERRED
TO THE BERLIN OFFICE (INCLUDING TAKING UP RESIDENCE
THERE) FROM THE TIME THE INDICTMENT IS ISSUED UNTIL
THE TIME THE TRIAL, INCLUDING APPEALS (IF THEY ARE
EXPECTED TO PARTICIPATE IN THE
APPELLE PROCESS), IS COMPLETED.

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7. COMMENT: ANY OF THE ABOVE STEPS WOULD HAVE A POLITICAL PRICE. THEY SHOULD BE UNDERTAKEN ONLY AFTER FULL CONSIDERATION AND IN OUR VIEW -- WITH THE POSSIBLE EXCEPTION OF (F) -- ONLY IF FRG HANDLING OF THE MATTER WORSENS. THEY SHOULD ALSO BE WEIGHED IN TERMS OF WHETHER THEY WOULD RESULT IN AN ENHANCED WESTERN POSITION VIS-A-VIS THE SOVIETS. OUR CONCERN AT THE MOMENT IS TO ENSURE THAT THE ALLIES AT LEAST ARE OF ONE MIND AND THAT DIFFERENCES BETWEEN THEM AND THE FRG ARE MINIMIZED. IT MAY OF COURSE BE NECESSARY, IN RESPONSE TO BRITISH OR FRENCH DEMANDS, TO CONSIDER ADDITIONAL MEASURES. HOWEVER, WE BELIEVE THAT THE BEST COURSE OF ACTION AT PRESENT IS NOT TO MAKE FURTHER DEMANDS ON THE GERMANS UNTIL WE HAVE TIME TO SEE WHETHER AMBASSADOR STOESSEL'S CONVERSATION WITH VAN WELL AND THE STEPS THE FOREIGN OFFICE IS TAKING WILL BEAR FRUIT. IT MIGHT ALSO BE HELPFUL FOR THE EMBASSY TO EXPRESS PRIVATELY TO THE FOREIGN OFFICE

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(IF THE BRITISH AND FRENCH ARE NOT PREPARED TO JOIN US IN DOING SO) OUR APPRECIATION FOR THE EFFORTS BEING MADE AND TO RAISE IN THE BONN GROUP THE QUESTION AS TO WHAT STEPS, IF ANY, THE FRG AND THE ALLIES MIGHT UNDERTAKE IN ORDER TO BE IN THE BEST POSSIBLE POSITION TO FEND OFF ADDITIONAL, STRONGER SOVIET PROTESTS. WE WILL ALSO PRESS FOR EARLY CONSIDERATION OF A DRAFT REPLY TO THE MOST RECENT SOVIET DEMARCHE.

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